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CHARLES ELMORE

No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1931

EDGAR PERCY LEWIS AND RICHARD F. COOPER, AS TRUSTEES UNDER THE WILL OF ARTHUR FRANCIS THOMAS COOPER, DECEASED, PETITIONERS

v.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 115

EDGAR PERCY LEWIS AND RICHARD F. COOPER, As Trustees Under the Will of Arthur Francis Thomas Cooper, Deceased, petitioners

v.

MARSHALL S. REYNOLDS, INDIVIDUALLY AND AS COLLECTOR of Internal Revenue

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court for the District of Wyoming (R. 37–40) is reported *sub nom. Collinson* v. *Reynolds* in 43 F. (2d) 395. The opinion of the Circuit Court of Appeals for the Tenth Circuit (R. 41–44) is reported in 48 F. (2d) 515.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 19, 1931. (R. 44.) The petition for a writ of certiorari was filed May 27, 1931, and the writ was granted October 12, 1931. (R. 45, 46.) Jurisdiction is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

An income tax return for the year 1920 claimed deduction of attorney's fees and of inheritance taxes paid, the first being the larger item. The Commissioner erroneously allowed the first and disallowed the second. A claim for refund was filed on account of the disallowance of the deduction for inheritance taxes. May the Commissioner, after the period for making an additional assessment of 1920 taxes has expired, reject the claim on the ground that, since the attorney's fees had been erroneously deducted in computing the tax, there was no overpayment of tax?

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are set forth in the Appendix, *infra,* pp. 27–36.

STATEMENT

This suit was brought in the District Court for the District of Wyoming to recover $7,297.16 with interest. A jury was waived and the following

facts (which are not in dispute) are contained in the findings of fact made by the District Court (R. 6–8):

Arthur Francis Thomas Cooper died December 8, 1918. On February 8, 1921, the administrator of his estate filed with the Commissioner of Internal Revenue an estate income tax return for the taxable period January 1 to December 12, 1920, final settlement of the estate having been made on the latter date. The return showed a tax liability of $13,082.61, which was paid. (R. 6–7.)

In this return a deduction was claimed for attorney's fees in the sum of $20,750 and for a State inheritance tax of $16,870. In the audit and review of the return, made in connection with the report of a revenue agent, the Commissioner disallowed the deduction claimed for the inheritance tax but allowed the deduction for attorney's fees. (R. 7.) On this basis the Commissioner determined that there was an additional tax liability of $7,297.16, which amount was paid by respondents on March 20, 1926. (R. 7.)

On July 29, 1926, the administrator filed a claim for refund of such additional tax. He based it upon the action of the Commissioner in disallowing as a deduction from gross income the amount of the State inheritance tax, $16,870, and in making certain minor adjustments which need not be considered here. (R. 7, 21–24.)

By letter dated May 18, 1929, the Commissioner advised the administrator that the amount of the

inheritance tax was allowed as a deduction for 1920, but that the sum of $20,750 representing attorney's fees, which had been claimed as a deduction in the return, had been disallowed, and that the claim for refund would be rejected. (R. 22–24.) The letter contained a computation of the tax resulting from the foregoing adjustments. (R. 23.) This computation showed an amount due the Government in addition to that already paid for the year, but the letter stated that the assessment of the additional tax was barred by the statute of limitations. (R. 7–8, 23.) No attempt has been made to collect it. (R. 8.)

The present suit was filed by the trustees under the will of decedent to recover $7,297.16 and interest, the refund claimed to be due as the result of allowing the State inheritance-tax deduction and certain small items of administration expense. (R. 1–3, 8.) The latter items were waived at the trial. (R. 8.) No evidence was adduced to show nor is any claim made that the attorney's fees were allowable deductions from gross income.

The District Court gave judgment for the defendant. (R. 8–9.) The Circuit Court of Appeals for the Tenth Circuit affirmed this judgment. (R. 44.) This Court granted a writ of certiorari on October 12, 1931.

SUMMARY OF ARGUMENT

The Commissioner rejected the claim for refund on the ground that, while the item forming the

basis of the claim should be deducted, the disallowance of other items showed an additional tax due, though it could not be collected because of the statute of limitations.

While the statutes authorizing refunds do not specifically authorize the Commissioner to reaudit the returns of the taxpayer in connection with claims for refund, such authority is necessarily implied because refunds are authorized only in case of overpayments. Moreover, in the absence of a closing agreement and subject to his inability to assess a tax after the expiration of the statutory period, he may redetermine a tax at any time. It has been the practice of the Internal Revenue Bureau, at least since 1918, to audit or reaudit returns in connection with refund claims. The practice is a matter of convenience to taxpayers and to the Government in disposing of the entire controversy over tax liability at one time.

The rule is not otherwise when the Commissioner's right to make an additional assessment for the year involved has expired. The running of the statute does not do away with the necessity of determining whether there has been an overpayment. It bars assessment and collection of any additional tax, but does not affect the right to retain taxes already assessed and collected, which are recoverable only if overpaid. The liability for the tax is not extinguished by the running of the statute, though the remedy is barred.

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Sections 607 and 609 of the Revenue Act of 1928 apply only to a credit of an overpayment for one year against a tax liability for another year; hence those statutes and the decisions under them have no application.

Nor is the Commissioner's action objectionable on the ground that the Commissioner asserted a deficiency without giving an opportunity to appeal to the Board. No deficiency has been asserted.

Even if the Commissioner's action in rejecting the claim for refund was erroneous, this suit, which is in the nature of an action for money had and received, can not be maintained, for petitioners have failed to establish that respondent has money to which, in equity and good conscience, they are entitled.

ARGUMENT

I

IN ACTING UPON A CLAIM FOR REFUND BASED UPON THE DISALLOWANCE OF A PARTICULAR DEDUCTION, THE COMMISSIONER OF INTERNAL REVENUE HAS AUTHORITY TO REAUDIT THE RETURN AND TO REJECT THE CLAIM ON THE BASIS OF THE DISALLOWANCE OF ANOTHER DEDUCTION EVEN THOUGH THE STATUTE OF LIMITATIONS PREVENTS HIM FROM MAKING AN ADDITIONAL ASSESSMENT FOR THE YEAR INVOLVED

In acting upon the petitioners' claim for refund of income taxes for the taxable period, January 1 to December 12, 1920, the Commissioner of Internal Revenue reaudited the return, allowed the deduction of $16,870 for the State inheritance tax, which was the basis of the claim, but disallowed a deduc-

tion of $20,750 for attorney's fees which had previously been allowed. The result of this adjustment was the disclosure of an additional tax due which the Commissioner did not attempt to assess or collect because of the expiration of the period of limitation. The Commissioner merely rejected the claim for refund on the ground that, since more than the tax involved in the claim for refund was actually owing to the Government for taxes, there was no overpayment of taxes and no refund could be made.

The petitioners urge that the Commissioner was without authority to determine the question of overpayment by recomputing the tax or for this purpose to disallow deductions erroneously allowed because the statute of limitations barred any further assessment for that year.

Section 284 (a) of the Revenue Act of 1926, *infra,* which was in effect when the claim for refund in the instant case was filed and when it was rejected (except for amendments under the Revenue Act of 1928), does not in terms authorize the Commissioner of Internal Revenue to reaudit returns in connection with claims for refund. It does, however, expressly condition all refunds and credits upon overpayment of taxes imposed by statute. The same is true of the provisions of earlier Acts. See Section 281 (a) of the Revenue Act of 1924, *infra,* and Section 252 of the Revenue Acts of 1918 and 1921, *infra.*

Accordingly it has been the uniform practice of the Bureau of Internal Revenue to reaudit returns in connection with the filing of claims for refund, at least since 1918.[1] This practice was adopted as a matter of convenience to the taxpayer as well as to the Government. It serves to prevent the duplication of effort involved in allowing a refund and subsequently making a new assessment for the same year where the correct tax liability can be ascertained at the time of action upon the claim.

This practice has been followed in the belief that the various statutes authorizing refunds of income taxes did not authorize a refund in any case unless the amount paid exceeds the tax actually owing upon a true and correct computation of the taxable income for the year involved and that it was not the intention of Congress to authorize the refund of any tax which under the statute was required to be assessed and paid.

This conclusion follows from the language of Section 284 (a) of the Revenue Act of 1926, *infra*, p. 33, which provides for the allowance of a refund where there has been "an overpayment" of income

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[1] This practice has been followed at least since February 6, 1918, when General Mim. #1 was issued by the office of the Commissioner of Internal Revenue. It contained the following provision:

"13. In the examination of a claim which involves the consideration of items upon a return every item upon such return is to be carefully audited, and upon conclusion of the case the clerk who has handled the claim will write upon the return: 'Audited by ——— ' with his initials."

tax imposed by previous Acts and any balance remains after crediting such excess against any other taxes due but unpaid. Under earlier statutes also, refunds have been predicated upon overpayment of the taxes imposed by the statute. Section 281 (a) of the Revenue Act of 1924; Section 252 of the Revenue Act of 1921; Section 252 of the Revenue Act of 1918, all *infra*.[2]

The courts seem to have taken it for granted that the finding of an overpayment is necessary to establish the right to a refund. *United States* v. *Swift & Co.*, 282 U. S. 468; *Magee* v. *United States*, 37 F. (2d) 763 (C. Cls.), affirmed on other grounds, 282 U. S. 432; *McCarl* v. *United States ex rel. Leland* (App. D. C.), 42 F. (2d) 346, certiorari denied, 282 U. S. 839. Conversely, no recovery can be had of an amount erroneously refunded without establishing that the original assessment was valid. *United States* v. *Pusey*, 47 F. (2d) 22 (C. C. A. 9th).

The court below held that there had been no overpayment of tax in this case since the correct tax was in excess of that paid. The petitioners do not contend that the deduction for attorney's fees which the Commissioner disallowed when he re-

[2] The 1918 and 1921 Acts speak of an amount of tax paid in excess of that properly due and the 1924 and 1926 Acts speak of the overpayment of taxes imposed by the statutes. Obviously the phraseology of the later Acts is merely a simplified expression of equivalent phrases in the earlier statutes.

jected the claim for refund constituted an allowable deduction, nor do they deny that the computation of the tax resulting from the disallowance of this item and the allowance of the deduction for the State inheritance tax and other small items is a correct computation. Their contention is merely that the Commissioner in determining whether to make a refund for 1920 had no power to recompute the correct tax and disallow this item which he had erroneously allowed in assessing the tax, because the statute of limitations barred any additional assessment for that year.

Certainly if the statute of limitations had not been involved the Commissioner could have recomputed the tax and based the rejection of the claim for refund upon the disallowance of a deduction which was not involved in the claim. Under such circumstances the case would come within the general rule that in the absence of a closing agreement, and so long as the statute of limitations has not run, the Commissioner may make redeterminations of tax liability. *Burnet* v. *Porter,* 283 U. S. 230. See also *Botany Mills* v. *United States,* 278 U. S. 282.

The right to make a redetermination in connection with a claim for refund to ascertain whether there is a net balance in favor of the taxpayer to be refunded, seems to us to be unaffected by the fact that the statute of limitations has run against

any additional assessment. The running of the statute of limitations as to assessments does not do away with the necessity of determining whether there has been an overpayment before any amount is refunded. It bars the assessment and collection of any additional tax found due, but does not affect the Commissioner's right to retain a tax which has already been assessed and collected before collection was barred by limitation.

This conclusion follows from the fact that there is no statutory period of limitation which relates to a case of this character. Section 277 (a) (3) of the Revenue Act of 1926, *infra,* provides that taxes imposed under the Revenue Act of 1918 "shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period." The corresponding provisions of the Revenue Acts of 1921 and 1924 are similar. In this case there was no assessment or collection of taxes barred by the statute and the limitation which the statute imposes can have no application. The statute does not provide that after the statute of limitations has run against assessment for a given year the Commissioner may not retain a tax already collected when an audit of the return shows a tax due in excess of that paid. The statute is a limitation solely upon assessments and proceedings to collect. It does

not require the return of a payment on account of tax liability for the particular year, made before the statute had run, when that amount or more was actually owed for taxes for that year.

The rule that the entire tax liability is to be considered in passing on a claim for refund is supported by decisions which recognize that a taxpayer can not sue to recover taxes paid for a given year where there is or may be an additional tax due. In *Suhr* v. *United States,* 18 F. (2d) 81, (C. C. A. 3rd), a taxpayer brought suit to recover a part of an income tax erroneously paid for the year 1917 by virtue of the inclusion in taxable income of stock dividends. Three weeks before the suit was instituted he had filed with the Board of Tax Appeals a petition to review a deficiency for 1917, determined by the Commissioner as the result of adjustments in other items after eliminating the stock dividends from taxable income. The court held that the suit was instituted prematurely, that whether the taxpayer owed or had overpaid its tax liability for 1917 could not be determined without considering the whole question of its tax liability. The court said (p. 82):

> The fact that plaintiff was entitled to a refund of the stock dividends did not give him authority to resort to the courts if he owed the Government any taxes for that year. He was simply entitled to have the overpayment credited against his other tax liability.

Section 252 Revenue Act of 1921 (42 Stat. 227); *Blair* v. *U. S. ex rel. Birkenstock*, 271 U. S. 348.[3]

The converse of the situation in the *Suhr* case was presented in *Camp* v. *United States*, 44 F. (2d) 126 (C. C. A. 4th), and *Ohio Steel Foundry Co.* v. *United States*, 38 F. (2d) 144 (C. Cls.). In those cases the institution of a suit preceded the assertion of the deficiency for the same year by the Commissioner. In the *Ohio Steel Foundry* case, *supra*, the Court of Claims held that it was not deprived of jurisdiction which it had already acquired, but that if the suit had followed the deficiency letter the suit would have been premature, as the taxpayer would be required to raise all questions regarding its tax liability before the Board. On the other hand, in the *Camp* case, *supra*, while the court held that it had jurisdiction, it remanded the case so as to permit the court below to decide whether to stay the proceeding pending a decision by the Board.[4] But see *Old Colony R. Co.* v. *United States*, 27 F. (2d) 994 (D. C. Mass.).

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[3] The reference to Section 252 is erroneous. See the decision in *Blair* v. *Birkenstock*, 271 U. S. 348.

[4] Neither the *Camp* case nor the *Ohio Steel Foundry* case involved an appeal taken to the Board under the Revenue Act of 1924 and undecided at the time of the passage of the Revenue Act of 1926, so that no question of the right to institute a suit in a District Court following the Board's decision was involved. See *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716.

There is no material difference between attempting to recover by means of a claim for refund and by means of a suit, since the rejection of the former (affirmatively or by inaction) must precede the latter under Section 3226 of the Revised Statutes, *infra*. Hence the decisions cited support our view that it is not only permissible but desirable that the finding of a refund and a deficiency for the same year should be avoided, and that the entire tax liability for a particular year should be dealt with at one time whenever possible.

That Congress has thought it desirable to settle all questions between the taxpayer and the Government that may be raised as to tax liability for a given year in a single controversy where it is possible to do so is further illustrated by provisions in the Revenue Act of 1926 requiring the Commissioner to consider previous refunds in determining the amount of a deficiency. See Sections 273 and 307 of the Revenue Act of 1926. *Levy* v. *Commissioner*, 48 F. (2d) 725 (C. C. A. 9th).

We submit, therefore, that when a claim for refund is filed by a taxpayer, setting forth certain facts and advancing supporting arguments, it is the duty of the Commissioner of Internal Revenue to determine whether an excess payment has been made by the taxpayer. In determining whether the taxpayer has made an excess payment the Commissioner is not confined to the issues raised in the claim for refund. That claim must specifi-

cally indicate the error upon which the taxpayer relies to show what inquiry should be made to permit a determination upon the claim, but that specification can not limit the scope of the Commissioner's inquiry. He is not required to close his eyes to all other facts and to all other questions which may come to his attention. He may completely audit the return and make any changes in his former rulings that he finds proper. Indeed, the true tax liability of the taxpayer can not be ascertained otherwise, for the tax is not based on any particular item of income but upon a net income determined after giving consideration to all sources of income and to all deductions and exemptions that are proper. A taxpayer's liability for a given year is a unit. See *Blair* v. *Birkenstock, supra.*

The rule that tax statutes are to be liberally construed in favor of the taxpayer has its limitations. It should not be applied to extend the protection of the statute of limitations to a situation to which that statute is not by its terms or necessary implication made applicable.

Many decisions recognize that ordinarily the running of a statute of limitations bars the remedy but does not extinguish the liability. *United States* v. *Whyel,* 28 F. (2d) 30 (C. C. A. 3d), certiorari dismissed, 278 U. S. 664; *Wright & Taylor* v. *Lucas,* 34 F. (2d) 328, affirmed, 45 F. (2d) 75 (C. C. A. 6th), affirmed, 282 U. S. 409; *Mascot Oil*

Co. v. *United States,* 42 F. (2d) 309 (C. Cls.), affirmed, 282 U. S. 434; *United States* v. *John Barth Co.,* 27 F. (2d) (C. C. A. 7th), reversed on other grounds, 279 U. S. 370. These decisions follow the rule as to debts in general in the absence of a contrary intent disclosed by the statute. *Campbell* v. *Holt,* 115 U. S. 620; *William Danzer Co. v. Gulf R. R.,* 268 U. S. 633. The principle that the liability survives even though the remedy may be barred, is also illustrated by the decisions holding that a waiver given after the expiration of the statute is valid. *Stange* v. *United States,* 282 U. S. 270; *Burnet* v. *Railway Equipment Co.,* 282 U. S. 295.

The Commissioner has merely taken both items into account in determining whether there was an overpayment and whether a refund should be made.

The petitioners contend that the respondent is actually in the position of asserting a counterclaim, although none is pleaded, and that the claim thus asserted is barred by the statute of limitations. But this is an incorrect analysis of the case. The burden is on the petitioners to show an overpayment and, since the action is essentially one for money had and received, that the respondent retains money to which they are, in equity and good conscience, entitled. Since the tax liability was greater than the amount retained, they have failed to sustain this burden, and the decision of the court below was, therefore, clearly right.

II

THE CASE DOES NOT INVOLVE ANY ATTEMPT ON THE PART OF THE COMMISSIONER TO CREDIT AN OVERPAYMENT AGAINST AN OUTLAWED ASSESSMENT OR TO ASSERT A DEFICIENCY WITHOUT GIVING AN OPPORTUNITY FOR A HEARING

The petitioners contend that the Commissioner's action in rejecting the claim for refund, on the ground that, while the deduction in dispute was allowable a larger item previously allowed as a deduction should have been disallowed, was tantamount to an attempt to credit an overpayment against a tax, the assessment of which was barred by the statute of limitations. They urge that the prohibition in Sections 607 and 609 of the Revenue Act of 1928, *infra,* against setting off an overpayment against a barred tax liability applies whether the barred liability is for the same year or another year. They argue that the sections just referred to and the decisions in *Bonwit Teller & Co.* v. *United States,* 283 U. S. 258; *Western Wholesale Drug Co.* v. *United States,* 47 F. (2d) 770 (S. D. Cal.), establish that the credit in this case was made without statutory authority. See also *Graham & Foster* v. *Goodcell,* 282 U. S. 409.

But Section 609 must necessarily be construed in conjunction with the provisions of the various Acts authorizing credits, and when so construed it is clear that it relates only to a credit for an overpayment for one year against a liability for another year.

Section 252 of the Revenue Act of 1918, *infra*, p. 27, provides that if upon an examination of any return of income made under that or previous Acts, the Commissioner finds that an amount of income tax, war-profits, or excess-profits tax has been paid in excess of that properly due then the amount of the excess—

> shall be credited against any income, war-profits, or excess-profits taxes, or installment thereof, then due from the taxpayer *under any other return*, and any balance of such excess shall be immediately refunded to the taxpayer: * * *. (Italics ours.)

Section 252 of the Revenue Act of 1921 contains identical language. That section was amended by the Act of March 4, 1923, but not in any way material here. Under these provisions there can be no doubt that a credit for an overpayment could only be made against a tax for another year.

In *Blair* v. *Birkenstock, supra,* this Court held that an excessive payment of an installment of tax for a given year was to be applied as a payment on installments not yet due for that year, but was not to be regarded as a credit within the meaning of Section 252 of the Revenue Act of 1918. The Bureau of Internal Revenue has consistently construed Section 252 of the Revenue Acts of 1918 and 1921 as relating only to credits against taxes due for another year. In I. T. 1447, C. B. I–2, p. 220, it was asserted that the purpose of Section 252 was to permit an adjudication of tax liability by the Com-

missioner without the necessity of the taxpayer filing a claim for refund and immediately repaying the refund to satisfy taxes due for another year. That this was the extent of the authority for credits in Section 252 of the Revenue Acts of 1918 and 1921 is also recognized in T. D. 3260, C. B. 5, p. 243; A. R. M. 123, C. B. 4, p. 330; Sol. Op. 79, C. B. 3, p. 302.

In Section 281 (a) of the Revenue Act of 1924, *infra*, p. 30, the language relating to credits was changed to read that if there had been an overpayment of any tax imposed by that Act or certain prior Acts the amount of such overpayment—

> shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

It will be noted that the phrase "under any other return" is omitted from this provision. It is also omitted from Section 284 (a) of the Revenue Act of 1926, *infra*, p. 33, but these omissions appear to have no significance. The Act of 1924 has been construed by the Treasury Department as if the phrase were implied. See Article 1304 of Regulations 65, *infra*, p. 36. The readoption of the same provision in the Act of 1926 after administrative construction imports legislative approval of the construction. *Brewster* v. *Gage*, 280 U. S. 327. Moreover, an examination of the reports of the Congressional committees which were responsible for the change

in the provision in the Revenue Act of 1924 reveals no discussion of the omission of this phrase, though other changes in the same section were discussed. See H. R. 179, 68th Cong., 1st Sess., p. 27; S. R. 398, 68th Cong., 1st Sess., p. 33; Conf. Rep. No. 884, 68th Cong., 1st Sess., pp. 24–25.

It seems clear under the statutes and regulations that the credit which is regarded as an overpayment under Section 609 (a) of the Revenue Act of 1928 is a credit of an overpayment for one year against an outlawed assessment for another year.

Apart from the statutes and regulations, the administrative practice as to allowance of credits supports this view. This practice is described in detail in *United States* v. *Swift & Co.*, 282 U. S. 468, where this Court had to determine the time when a credit is allowed. The Court quoted instructions on the schedule of overassessments then in use as follows (pp. 471–472):

> You will immediately check the items therein against the accounts of the several taxpayers and determine whether the several amounts in which the tax liability has been reduced should be abated in whole or in part and make such abatement as may be warranted by the condition of the taxpayer's account for the year involved.
>
> If any part of the tax is found to be an overpayment, you will examine all accounts of the taxpayer for subsequent periods and apply such overpayment as a credit against the tax owing (if any) on the taxpayer's ac-

count for subsequent periods. (This applies to income, war-profits, and excess-profits taxes only.)

It is submitted that Section 609 has no application to this case.

Nor do we consider that *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, has any possible application here. That decision involved an action to recover the amount of an overpayment of income tax for the fiscal year ended January 31, 1919. The Government filed a counterclaim for the amount of a check sent to the plaintiff in payment of the balance of the refund remaining after deducting a part to pay an additional tax for the year ended January 31, 1917, which was barred by the statute of limitations. The question was whether the taxpayer's right to recover was barred by the statute of limitations and involved in part a construction of Section 281 (a) of the Revenue Act of 1924, as amended, relating to the effect of certain waivers of the period of limitations on refunds. The Court emphasized the fact that the Commissioner had notified the taxpayer of the overassessment shortly after the enactment of the amendment and had advised it of the necessity of filing a waiver in accordance with the provisions of the amendment without at the same time advising it of the necessity for filing a claim for refund. The Court therefore held that the waiver which was subsequently filed (considered in the light of surrounding circumstances) should

be regarded as an adequate claim, and, further, that a suit based upon a determination and certification by the Commissioner that taxpayer was entitled to a refund of a specified amount was not barred by the lapse of five years from the payment of the tax.

In the *Western Wholesale Drug Company* case, 47 F. (2d) 770, 1919 taxes had been paid partly in cash and partly by the application of a credit for an overpayment of 1920 taxes. The taxpayer subsequently filed a claim for refund of 1919 taxes and the Commissioner in acting upon this claim attempted to reduce the amount allowed by part of the credit previously allowed on the ground that additional taxes were due for 1920. The court held that this could not be done, as the credit which had been made constituted payment of 1919 taxes and the correctness of the 1920 assessment was not in issue. Clearly, for reasons which have already been stated, the question involved in that case is wholly different from the question here, where a single taxable year is involved.

Nor can any objection to the Commissioner's action in rejecting the claim for refund be predicated on the assertion that the Commissioner has thus redetermined a tax without giving the petitioners the notice prescribed in Sections 274 (a) and 283 (a) of the Revenue Act of 1926, *infra*, pp. 31, 32, and without giving him the statutory remedy of appeal from the assessment to the Board of Tax Appeals.

The Commissioner in this case has not attempted to assert a deficiency in tax. He has acknowledged his inability to do so because of the running of the statute of limitations. It is only in case of a deficiency in tax that the sending of a sixty-day letter giving the taxpayer the right of appeal to the Board is required. Section 274 (a) of the Revenue Act of 1926, *infra*, p. 31. The Commissioner is merely seeking to retain that which has already been paid; he is not claiming an additional payment. Hence, the petitioners have not been deprived of any right of appeal to the Board of Tax Appeals, to which they are entitled under the statute.

In this connection it should be noted that if the taxpayer had desired to secure a judicial review of the question whether the deduction for attorney's fees should have been allowed he could have done so. All that was required was that he file another claim for refund relating to that item and upon its rejection sue to recover the tax paid. There was ample time within which to take this step. The original claim was rejected May 18, 1929. (R. 22.) The tax was paid on March 20, 1926, and the taxpayer had until March 20, 1930, within which to file another claim. Section 284 (b) of the Revenue Act of 1926, *infra*, p. 33.

The taxpayer also had the opportunity to litigate in this action the deductibility of the item of attorney's fees by proper pleading and proof. Had he prevailed in that respect he would have established his right to the refund here claimed.

III

EVEN IF THE COMMISSIONER'S ACTION IN REJECTING THE CLAIM FOR REFUND AS THE RESULT OF DISALLOWING THE ITEM FOR ATTORNEY'S FEES WAS ERRONEOUS, PETITIONERS CAN NOT RECOVER IN THIS SUIT

In view of the fact that the Commissioner has not collected any tax in excess of that due under a correct computation, the petitioners can not recover in this suit against the Collector.

In *Champ Spring Co.* v. *United States,* 47 F. (2d) 1 (C. C. A. 8th), certiorari denied, 283 U. S. 852, the Government had refunded certain excise taxes which under the decision of this Court in *Universal Battery Co.* v. *United States,* 281 U. S. 580, should not have been refunded. The Government attempted to make another assessment of the amount refunded and demanded payment. It succeeded in collecting the amount by duress after the right to collect was barred by the statute of limitations. The taxpayer later sued to recover in an action under the Tucker Act. The court held that the action could not be maintained since the action was one for money had and received and, upon familiar principles, that it can be maintained only when the defendant has money which in equity should be paid to the plaintiff. The court there said (pp. 2–3):

> In the view we take of the issues, it is not necessary to determine whether the collector of internal revenue had authority to make the reassessment. As has been observed the plaintiff's action is in the nature of a suit

for money had and received. While this is an action at law, it is nevertheless governed by equitable principles, and it can be maintained only when one has money in his hands belonging to another, which in equity and good conscience he ought to pay over to that other. The issue in this case is: To whom does the money in equity, justice, and good conscience belong? If the plaintiff fails to show that it has a superior right to that of the defendant, it can not recover. [Cases cited.]

* * * * *

It was therefore incumbent upon the plaintiff, to entitle it to recover, to show, not that the defendant had by some illegal method secured these funds, but that the plaintiff had a better right to them than the defendant. The funds were erroneously refunded to plaintiff by an officer of the government. They confessedly belonged to the government. It can not therefore be said that in equity and good conscience the plaintiff, as against the defendant, was entitled to this money. Before it could recover, it must show a better right thereto than that of the government, and this it has failed to do. If the plaintiff has suffered any damage by reason of the wrongful acts of the revenue officers in resorting to distraint instead of resorting to an action at law, it has its remedy, but the mere fact of such irregularity does not create in the plaintiff, in equity and good conscience, a right to recover these funds.

An action against the Collector to recover taxes paid is also an action for money had and received (*City of Philadelphia* v. *The Collector,* 5 Wall. 720) and the taxpayer may recover only such money as he is equitably entitled to receive. *J. W. Carter Music Co.* v. *Bass,* 20 F. (2d) 390 (S. D. Tex.); *New York Life Ins. Co.* v. *Anderson,* 263 Fed. 527 (C. C. A. 2d), certiorari denied, 256 U. S. 696.

In addition to holding that the petitioners had failed to establish an overpayment, we submit that the court below correctly held that this was an action for money had and received and that petitioners could not recover because they had failed to establish that the respondent had money which in equity and good conscience belonged to petitioners.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
HELEN R. CARLOSS,
Special Assistants to the Attorney General.

NOVEMBER, 1931.

APPENDIX

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, 1085:

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

SEC. 252. That if, upon examination of any return of income made pursuant to this Act, the Act of August 5, 1909, entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," the Act of October 3, 1913, entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," the Revenue Act of 1916, as amended, or the Revenue Act of 1917, it appears that an amount of income, war-profits, or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess profits taxes, or in-

stallment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer.

Revenue Act of 1921, c. 136, 42 Stat. 227, 265, 268:

SEC. 250. (d) The amount of income, excess profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *.

SEC. 252.[5] That if, upon examination of any return of income made pursuant to this Act, * * * or the Revenue Act of 1918, it appears that an amount of income, war-profits or excess-profits tax has been paid in excess of that properly due, then, notwithstanding the provisions of section 3228 of the Revised Statutes, the amount of the excess shall be credited against any income, war-profits or excess-profits taxes, or installment thereof, then due from the taxpayer under any other return, and any balance of such excess shall be immediately refunded to the taxpayer: *Provided,* That no such credit or refund shall be allowed or made after five years from the date when the return was due, unless before the expiration of such five years a claim therefor is filed by the taxpayer: * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 301, 343:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of

[5] This section was amended by the Act of March 4, 1923, c. 276, 42 Stat. 1504, and the Act of March 13, 1924, c. 55, 43 Stat. 22, but not in any way material here.

1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Title 26, Sec. 1057.)

SEC. 281. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1918, or the Revenue Act of 1921, or any such Act as amended, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer. (U. S. C., Title 26, Section 1065.)

SEC. 1014.[6] (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, pen-

[6] This section was reenacted without change in Section 1113 of the Revenue Act of 1926. (U. S. C. Sup. IV, Title 26, Sec. 156.)

alty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

(b) This section shall not affect any proceeding in court instituted prior to the enactment of this Act. (U. S. C., Title 26, Section 156.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 55, 58, 63, 66:

SEC. 274. (a) If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in section 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition

has been filed with the Board, until the decision of the Board has become final. Notwithstanding the provisions of section 3224 of the Revised Statutes the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. (U. S. C., Sup. IV, Title 26, Section 1048.)

SEC. 277. (a) Except as provided in section 278—

* * * * *

(3) The amount of income, excess-profits, and war-profits taxes imposed by the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period. (U. S. C., Sup. IV, Title 26, Section 1057.)

SEC. 283. (a) If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person

liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act. In the case of any such determination the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall, except as provided in subdivision (d) of this section, be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand and the provisions prohibiting claims and suits for refund) as in the case of a deficiency in the tax imposed by this title, except as otherwise provided in section 277 of this Act. (U. S. C., Sup. IV, Title 26, Section 1064.)

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer. (U. S. C., Sup. IV, Title 26, Section 1065.)

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax

imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund.

Revenue Act of 1928, c. 852, 45 Stat. 791, 874, 875, 878:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. U. S. C., Sup. IV, Title 26, Section 2607.)

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commis-

sioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspending the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Sup. IV, Title 26, Section 2608.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act. (U. S. C., Sup. IV, Title 26, Section 2609.)

SEC. 619. MINOR ADMINISTRATIVE AMENDMENTS.

* * * * *

(b) Section 3220 of the Revised Statutes, as amended by section 1111 of the Revenue Act of 1926, is amended by striking out "Except as otherwise provided in sections 284 and 319 of the Revenue Act of 1926"

and inserting in lieu thereof "Except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes." (U. S. C., Sup. IV, Title 26, Section 149.)

Treasury Regulations 65:

ART. 1304. *Claims for credit of taxes erroneously collected.*—Any amount of income, war-profits, or excess-profits tax paid in excess of that properly due shall be credited against any such taxes due from the taxpayer under any other return. To obtain such credit, the taxpayer should proceed as follows:

(1) Where the credit demanded is equal to or less than any outstanding assessment of tax, a taxpayer desiring to obtain such credit shall file with the collector charged with the assessment of the tax against which the credit is desired a claim on Form 843 which shall be sworn to and shall contain the following statements: (a) business engaged in by the claimant, (b) character of assessment of tax, (c) amount of tax claimed as a credit, (d) unpaid assessment against which credit is asked and for what taxable year, and (e) all facts regarding the overpayment.

(2) Where the amount claimed as a credit is greater than the outstanding assessment of tax, a taxpayer desiring to obtain such credit and the refund to which he is entitled shall file Form 843, stating thereon the respective amounts claimed as a credit or as a refund. See article 1306. All facts regarding the total overpayment should be stated in the claim.

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